

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

JORGE PAVON HERNANDEZ,
ALEJANDRO PAVON, and ALEXIS
BRAVO, *individually and on behalf of others*
similarly situated

Plaintiffs,

Civil Action No.: 1:20-cv-04741-PAE

ANSWER TO PLAINTIFFS'
COMPLAINT

v.

GEMINI DINER INC. (D/B/A GEMINI
DINER), CONSTANTINOS KASSIMIS,
CHRISTOS ARGYROS, and NIKOLAOS
ARGYROS

Defendants.

Defendant Gemini Diner, Inc., d/b/a Gemini Diner, Constantinos Kassimis, Christos Argyros, and Nikolas Argyros (individually “Defendant” and collectively “Defendants”), by and through its respective undersigned counsel, hereby answers the Plaintiffs’ Complaint as follows:

1. Defendants do not have sufficient information to admit or deny the allegations in paragraph 1.
2. Admit
3. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 3 of the Complaint.
4. Admit.
5. Deny the allegations in paragraph 5 of the Complaint.
6. Deny the allegations in paragraph 6 of the Complaint.
7. Deny the allegations in paragraph 7 of the Complaint.
8. Deny the allegations in paragraph 8 of the Complaint.

9. Deny the allegations in paragraph 9 of the Complaint.
10. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 10 of the Complaint.
11. Deny the allegations in paragraph 11 of the Complaint.
12. Deny the allegations in paragraph 12 of the Complaint.
13. Deny the allegations in paragraph 13 of the Complaint.
14. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 14 of the Complaint.
15. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 15 of the Complaint.
16. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 16 of the Complaint.
17. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 17 of the Complaint.
18. Defendants do not have sufficient information to admit or deny the allegations in paragraph 18.
19. Deny the allegations in paragraph 19 of the Complaint.
20. Defendants do not have sufficient information to admit or deny the allegations in paragraph 20.
21. Deny the allegations in paragraph 21 of the Complaint.
22. Defendants do not have sufficient information to admit or deny the allegations in paragraph 22.
23. Deny the allegations in paragraph 23 of the Complaint.

- 24. Deny the allegations in paragraph 24 of the Complaint.
- 25. Deny the allegations in paragraph 25 of the Complaint.
- 26. Deny the allegations in paragraph 26 of the Complaint.
- 27. Deny the allegations in paragraph 27 of the Complaint.
- 28. Deny the allegations in paragraph 28 of the Complaint.

FACTUAL ALLEGATIONS

- 29. Admit the allegations in paragraph 29 of the Complaint.
- 30. Deny the allegations in paragraph 30 of the Complaint.
- 31. Deny the allegations in paragraph 31 of the Complaint.
- 32. Deny the allegations in paragraph 32 of the Complaint.
- 33. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 33 of the Complaint.
- 34. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 34 of the Complaint.
- 35. (a) – (h). Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 35 of the Complaint.
- 36. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 36 of the Complaint.
- 37. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 37 of the Complaint.
- 38. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 38 of the Complaint.
- 39. Deny the allegations in paragraph 39 of the Complaint.

40. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 40 of the Complaint.

41. Deny the allegations in paragraph 41 of the Complaint.

42. Deny the allegations in paragraph 42 of the Complaint.

43. Deny the allegations in paragraph 43 of the Complaint.

44. Deny the allegations in paragraph 44 of the Complaint.

45. Deny the allegations in paragraph 45 of the Complaint.

46. Deny the allegations in paragraph 46 of the Complaint.

47. Deny the allegations in paragraph 47 of the Complaint.

48. Deny the allegations in paragraph 48 of the Complaint.

49. Deny the allegations in paragraph 49 of the Complaint.

50. Deny the allegations in paragraph 50 of the Complaint.

51. Deny the allegations in paragraph 51 of the Complaint.

52. Deny the allegations in paragraph 52 of the Complaint.

53. Deny the allegations in paragraph 53 of the Complaint.

54. Deny the allegations in paragraph 54 of the Complaint.

55. Deny the allegations in paragraph 55 of the Complaint.

56. Deny the allegations in paragraph 56 of the Complaint.

57. Deny the allegations in paragraph 57 of the Complaint.

58. Deny the allegations in paragraph 58 of the Complaint.

59. Deny the allegations in paragraph 59 of the Complaint.

60. Deny the allegations in paragraph 60 of the Complaint.

61. Deny the allegations in paragraph 61 of the Complaint.

62. Deny the allegations in paragraph 62 of the Complaint.
63. Deny the allegations in paragraph 63 of the Complaint.
64. Deny the allegations in paragraph 64 of the Complaint.
65. Deny the allegations in paragraph 65 of the Complaint.
66. Deny the allegations in paragraph 66 of the Complaint.
67. Deny the allegations in paragraph 67 of the Complaint.
68. Deny the allegations in paragraph 68 of the Complaint.
69. Deny the allegations in paragraph 69 of the Complaint.
70. Deny the allegations in paragraph 70 of the Complaint.
71. Deny the allegations in paragraph 71 of the Complaint.
72. Deny the allegations in paragraph 72 of the Complaint.
73. Deny the allegations in paragraph 73 of the Complaint.
74. Deny the allegations in paragraph 74 of the Complaint.
75. Deny the allegations in paragraph 75 of the Complaint.
76. Deny the allegations in paragraph 76 of the Complaint.
77. Deny the allegations in paragraph 77 of the Complaint.
78. Deny the allegations in paragraph 78 of the Complaint.
79. Deny the allegations in paragraph 79 of the Complaint.
80. Deny the allegations in paragraph 80 of the Complaint.
81. Deny the allegations in paragraph 81 of the Complaint.
82. Deny the allegations in paragraph 82 of the Complaint.
83. Deny the allegations in paragraph 83 of the Complaint.
84. Deny the allegations in paragraph 84 of the Complaint.

85. Deny the allegations in paragraph 85 of the Complaint.
86. Deny the allegations in paragraph 86 of the Complaint.
87. Deny the allegations in paragraph 87 of the Complaint.
88. Deny the allegations in paragraph 88 of the Complaint.
89. Deny the allegations in paragraph 89 of the Complaint.
90. Deny the allegations in paragraph 90 of the Complaint.
91. Deny the allegations in paragraph 91 of the Complaint.
92. Deny the allegations in paragraph 92 of the Complaint.
93. Deny the allegations in paragraph 93 of the Complaint.
94. Deny the allegations in paragraph 94 of the Complaint.
95. Deny the allegations in paragraph 95 of the Complaint.
96. Deny the allegations in paragraph 96 of the Complaint.
97. Deny the allegations in paragraph 97 of the Complaint.
98. Deny the allegations in paragraph 98 of the Complaint.
99. Deny the allegations in paragraph 99 of the Complaint.
100. Deny the allegations in paragraph 100 of the Complaint.
101. Deny the allegations in paragraph 101 of the Complaint.
102. Deny the allegations in paragraph 102 of the Complaint.
103. Deny the allegations in paragraph 103 of the Complaint.
104. Deny the allegations in paragraph 104 of the Complaint.
105. Deny the allegations in paragraph 105 of the Complaint.
106. Deny the allegations in paragraph 106 of the Complaint.
107. Deny the allegations in paragraph 107 of the Complaint.

108. Deny the allegations in paragraph 108 of the Complaint.
109. Deny the allegations in paragraph 109 of the Complaint.
110. Deny the allegations in paragraph 110 of the Complaint.
111. Deny the allegations in paragraph 111 of the Complaint.
112. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 112 of the Complaint.
113. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 113 of the Complaint.
114. Deny the allegations in paragraph 114 of the Complaint.
115. Deny the allegations in paragraph 115 of the Complaint.
116. Deny the allegations in paragraph 116 of the Complaint.
117. Deny the allegations in paragraph 117 of the Complaint.
118. Deny the allegations in paragraph 118 of the Complaint.
119. Deny the allegations in paragraph 119 of the Complaint.
120. Deny the allegations in paragraph 120 of the Complaint.
121. Deny the allegations in paragraph 121 of the Complaint.
122. Deny the allegations in paragraph 122 of the Complaint.
123. Deny the allegations in paragraph 123 of the Complaint.
124. Deny the allegations in paragraph 124 of the Complaint.
125. Deny the allegations in paragraph 125 of the Complaint.
126. Deny the allegations in paragraph 126 of the Complaint.
127. Deny the allegations in paragraph 127 of the Complaint.
128. Deny the allegations in paragraph 128 of the Complaint.

FLSA COLLECTIVE ACTION ALLEGATIONS

129. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 129 of the Complaint.

130. Deny the allegations in paragraph 130 of the Complaint.

131. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 131 of the Complaint.

STATEMENT OF CLAIM

COUNT I

VIOLATION OF THE MINIMUM WAGE PROVISIONS OF THE FLSA

132. Defendants incorporate their responses set forth above, as though fully set forth herein.

133. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 133 of the Complaint.

134. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 134 of the Complaint.

135. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 135 of the Complaint.

136. Deny the allegations in paragraph 136 of the Complaint.

137. Deny the allegations in paragraph 137 of the Complaint.

138. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 138 of the Complaint.

COUNT II

VIOLATION OF THE OVERTIME PROVISIONS OF THE FLSA

139. Defendants incorporate their responses set forth above, as though fully set forth herein.

140. Deny the allegations in paragraph 140 of the Complaint.

141. Deny the allegations in paragraph 141 of the Complaint.

142. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 142 of the Complaint.

COUNT III

VIOLATION OF THE NEW YORK MINIMUM WAGE ACT

143. Defendants incorporate their responses set forth above, as though fully set forth herein.

144. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 144 of the Complaint.

145. Deny the allegations in paragraph 145 of the Complaint.

146. Deny the allegations in paragraph 146 of the Complaint.

147. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 147 of the Complaint.

COUNT IV

VIOLATION OF THE OVERTIME PROVISIONS OF THE NEW YORK STATE

LABOR LAW

148. Defendants incorporate their responses set forth above, as though fully set forth herein.

149. Deny the allegations in paragraph 149 of the Complaint.

150. Deny the allegations in paragraph 150 of the Complaint.

151. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 151 of the Complaint.

COUNT V

VIOLATION OF THE SPREAD OF HOURS WAGE ORDER OF THE NEW YORK

COMMISSIONER OF LABOR

152. Defendants incorporate their responses set forth above, as though fully set forth herein.

153. Deny the allegations in paragraph 153 of the Complaint.

154. Deny the allegations in paragraph 154 of the Complaint.

155. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 155 of the Complaint.

COUNT VI

VIOLATION OF THE NOTICE AND RECORDKEEPING REQUIREMENTS OF THE

NEW YORK LABOR LAW

156. Defendants incorporate their responses set forth above, as though fully set forth herein.

157. Deny the allegations in paragraph 157 of the Complaint.

158. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 158 of the Complaint.

COUNT VII

VIOLATION OF THE WAGE STATEMENT PROVISIONS OF THE NEW YORK

LABOR LAW

159. Defendants incorporate their responses set forth above, as though fully set forth herein.

160. Deny the allegations in paragraph 160 of the Complaint.

161. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 161 of the Complaint.

COUNT VIII

RECOVERY OF EQUIPMENT COSTS

162. Defendants incorporate their responses set forth above, as though fully set forth herein.

163. Deny the allegations in paragraph 163 of the Complaint.

164. Refer all questions of law to the Court at the trial of this action and otherwise deny the remainder of the allegations in paragraph 164 of the Complaint.

AS AND FOR THE FIRST AFFIRMATIVE DEFENSE

165. The Complaint, in whole or in part, fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

166. This Court should not exercise supplemental jurisdiction over the counts in the Complaint that purport to arise under the New York State Law.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

167. Defendants, at all times, acted in good faith to comply with the FLSA and the NYLL, and with reasonable grounds to believe that its actions did not violate the statutes cited in the Complaint, and Defendants assert a lack of willfulness or intent to violate the FLSA or the NYLL as a defense to any claim by Plaintiff for liquidated damages.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

168. Plaintiff's claims are barred, in whole or in part, by the provisions of Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259, because such actions taken in connection with Plaintiff's compensation were done in good faith in conformity with and reliance upon written administrative regulations, orders, rulings, approvals, interpretations, and written and unwritten administrative practices or enforcement policies of the Administrator of the Wage and Hour Division of the United States Department of Labor.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

169. Plaintiff's claims are barred, in whole or in part, by the provisions of Section 11 of the Portal-to-Portal Act, 29 U.S.C. § 260, because any acts or omissions giving rise to this action were done in good faith and with reasonable grounds for believing that the actions or omissions were not in violation of the FLSA or the NYLL.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

170. Plaintiff's claims are barred, in whole or in part, to the extent that the work they performed falls within exemptions, exclusions, exceptions, or credits provided for in Section 7 of the FLSA, 29 U.S.C. § 207, or the NYLL.

AS AND FOR AN SEVENTH AFFIRMATIVE DEFENSE

171. Plaintiff's claims are barred, in whole or in part, to the extent Plaintiff failed, refused, and/or neglected to mitigate or avoid the damages complained of in the Complaint, if any.

AS AND FOR A EIGHTH AFFIRMATIVE DEFENSE

172. If Plaintiff succeeds in establishing a violation under the FLSA or the NYLL, and to the extent any sums are found due and owing to Plaintiff, which is expressly denied, Defendants are entitled to a set-off against said sum to the extent paid, tendered, waived, compromised, and/or

released prior to the adjudication herein, including but not limited to those amounts paid, tendered, waived, compromised, and/or released through any other proceeding, either formal or informal, or to the extent any additional compensation was paid to Plaintiff over and above his wages.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

173. Any claim for additional compensation by Plaintiff must be reduced by compensation already paid to Plaintiff for periods not compensable under the FLSA and/or the NYLL.

AS AND FOR AN TENTH AFFIRMATIVE DEFENSE

174. Plaintiff's claims are barred or should be reduced, in whole or in part, by exclusions, exceptions, credits, recoupments, or offsets permissible under the FLSA or the NYLL.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE

175. Plaintiff is not entitled to any equitable relief because he has an adequate remedy at law. This defense also may apply to the claims of some or all of the class of allegedly similarly situated persons.

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE

176. Plaintiff's Complaint is presented in conclusory and vague terms, which prevents Defendants from anticipating all affirmative defenses and claims that may be applicable in this action. Therefore, to the extent permitted under the Federal Rules of Civil Procedure and applicable case law, Defendants reserve the right to assert additional defenses or claims that may become known during the course of discovery.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE

177. Plaintiff's claims are barred, in whole or in part, by the provisions of 29 U.S.C. § 207, because the Defendants were not, at any relevant time, an enterprise engaged in commerce within the meaning of the law.

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE

178. Plaintiff's claims are barred, in whole or in part, under the doctrine of waiver, laches, estoppel, ratification, acquiescence, or unclean hands.

AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE

179. Defendants have no knowledge of, nor should they have had knowledge of, any alleged uncompensated work by the Plaintiff, and Defendants did not authorize, require, request, suffer, or permit such activity by the Plaintiff as forth in the Complaint.

AS AND FOR A SIXTEENTH AFFIRMATIVE DEFENSE

180. The Complaint, and each cause of action thereof, is barred – or the damages flowing therefrom reduced – because Plaintiff failed to notify Defendants of the alleged statutory violations at the time such violations allegedly occurred, which prevented Defendants from taking any action to remedy such alleged violations.

AS AND FOR A SEVENTEENTH AFFIRMATIVE DEFENSE

181. Plaintiff is not entitled to an award of liquidated damages under both FLSA and NYLL with respect to the same violation. As such, Plaintiff's allegations of entitlement to both in the Complaint are improper and must be dismissed

AS AND FOR AN EIGHTEENTH AFFIRMATIVE DEFENSE

182. Plaintiff cannot establish or satisfy the requirements of a collective action pursuant to Section 216(b) of the FLSA and, therefore, the collective action allegations of the Complaint should be stricken and dismissed.

AS AND FOR A NINETEENTH AFFIRMATIVE DEFENSE

183. In addition to the foregoing defenses, Defendants reserve the right to amend its Answer to raise any and all other additional affirmative and other defenses that may become evident during discovery and during any other proceeding in this action or pursue any available counterclaims against Plaintiff or any putative class member who joins this action as those claims become known during this litigation.

WHEREFORE, Defendants request judgment against the Plaintiff with respect to his claims asserted herein, dismissing the Complaint in this action, and entering judgment in favor of Defendants, together with costs and disbursements of the above-entitled action and any other relief this Court may deem just and proper.

Dated: New York, New York
November 17, 2020

Respectfully Submitted,

**KOUTSOUDAKIS & IAKOVOU
LAW GROUP, PLLC**

/s/ Andreas Koutsoudakis
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